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No. D

Supreme Court, U.S.
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In The Supreme Court of the United States

OFFICE OF THE CLERK

WILLIAM EUGENE WEBB,

Petitioner,

v.

MATTHEW B. HAMIDULLAH, WARDEN,
Z.R. VENDEL, M.D., MEDICAL DIRECTOR,
STEVE LABIER, UNIT MANAGER,
CHARLES GRUBBS, UNIT MANAGER,
UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred and opened a circuit split in awarding summary judgment in favor of Respondents when Petitioner presented a prima facie case that Respondents were deliberately indifferent to his serious medical condition in violation of his rights under the Eighth Amendment to the Constitution of the United States?

Whether the United States Court of Appeals for the Fourth Circuit erred and opened a circuit split in concluding that on the facts presented here – Petitioner suffered a life threatening malady, numerous physicians recommended surgical intervention, and prison officials refused to order the surgery for nearly five years – that the reasonableness of the prison officials' actions could be determined as a matter of law?

PARTIES TO THE PROCEEDING

Petitioner

William Eugene Webb

Respondents

Matthew B. Hamidullah, Warden; Z. R. Vendel, M.D., Medical Director; Steve LaBier, Unit Manager; Charles Grubbs, Unit Director; United States of America

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Petitioner William Eugene Webb ("Webb") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The unpublished per curium opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the District of South Carolina, *Webb v. Hamidullah, et al.*, No. 06-7381, 281 F. App'x 159, 2008 WL 2337608 (June 6, 2008), which is contained in the Appendix at A-1.

The Judgment Order of the United States Court of Appeals for the Fourth Circuit, *Webb v. Hamidullah, et al.*, No. 06-7381 (June 6, 2008), which is contained in the Appendix at A-29.

The memorandum opinion of the United States District Court for the District of South Carolina adopting the report and recommendation of the magistrate judge, *Webb v. Hamidullah, et al.*, Civil Action No. 0:05-2546-HFF-BM (July 24, 2006), which is contained in the Appendix at A-30.

The Order of the Clerk of Court of the United States District Court for the District of South Carolina entering summary judgment for the Respondents, *Webb v. Hamidullah, et al.*, Civil Action No. 0:05-2546-HFF-BM (July 25, 2006), which is contained in the Appendix at A-35.

The Report and Recommendation of Bristow Marchant, United States Magistrate Judge, United States District Court, District of South Carolina, *Webb v. Hamidullah, et al.*, Civil Action No. 0:05-2546-HFF-BM (June 23, 2006), which is contained in the Appendix at A-37.

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's Petition for Rehearing and Rehearing En Banc, *Webb v. Hamidullah, et al.*, No. 06-7381 (August 8, 2008), which is contained in the Appendix at A-70.

JURISDICTION

This Court has jurisdiction to review the order of the court of appeals on a writ of certiorari pursuant to 28 U.S.C. § 1254 (1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 6, 2008. Webb's timely Petition for Rehearing and Rehearing En Banc was denied on August 8, 2008. This petition for writ of certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.3. Jurisdiction in the trial court was based on 28 U.S.C. § 1331, as this is an action arising under the Eighth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides: "Excessive bai' shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

In a decision issued on June 6, 2008, a panel of the United States Court of Appeals for the Fourth Circuit held that as a matter of law prison medical staff was not "deliberately indifferent" to Webb's serious medical need to have surgery "absent some resultant harm or worsened condition" despite that Webb waited nearly five years to have a ventral hernia surgically reduced. *Webb v. Hamidullah*, 281 F. App'x 159, 2008 WL 2337608 (4th Cir., June 6, 2008); (Appendix at A-1 through 29) (quotation at A-24; *see also* A-19 through A-20).

In a dissent, Judge Gregory stated that irreparable harm need not be suffered in a claim for deliberate indifference and concluded that Webb stated an Eighth Amendment violation against prison officials who denied his treatment. (Appendix at A-24 through A-28). Webb timely moved for a panel rehearing or rehearing en banc, which the Fourth Circuit denied on August 8, 2008. (Appendix at A-70).

The panel decision, as recognized by the dissent, conflicts both with an unpublished decision of the Fourth Circuit Court of Appeals, *Clinkscales v. Pamlico Corr. Facility*, 238 F.3d 411, 2000 WL 1726592 (4th Cir. 2000), and with the published opinion of the third circuit cited in the *Clinkscales* case, *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346-47 (3d Cir. 1987). As a consequence, review of the Fourth Circuit's decision is compelled because a United States court of

appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Sup. Ct. R. 10(a).

I. Procedural History

The Fourth Circuit Court of Appeals reviewed an order of the United States District Court for the District of South Carolina awarding summary judgment to several officials of the Federal Correctional Institute in Estill, South Carolina ("FCI-Estill") in a civil action filed by Webb. *Webb v. Hamidullah*, 2006 WL 2076942 (D.S.C., July 24, 2006); (Appendix at A-30 through A-36; *see also* A-37through A-69). Proceeding *pro se*, Webb sought compensatory and punitive damages and injunctive relief against these officials for violation of his rights guaranteed him by the Eighth Amendment to the Constitution of the United States because he had not been provided medical care known to be necessary while he was incarcerated in federal prison.

On September 12, 2005, Webb filed a *pro se* Complaint in the District of South Carolina against Matthew B. Hamidullah, Warden; Z. R. Vendel, M.D., Medical Director; Steve LaBier, Unit Manager; and Charles Grubbs, Unit Director. (Appendix at A-4). Webb filed an amended *pro se* Complaint on October 6, 2005. Specifically, Webb pled *inter alia* that Respondents repeatedly denied him surgeries medically necessary to repair an abdominal hernia that, according to consulting physicians, required surgical intervention. (*Id.*) Webb attached to his Amended Complaint copies of his medical records documenting his chronic pain and injuries. On

November 23, 2005, Webb moved the district court to enter a preliminary injunction or temporary restraining order, attaching additional documentation in support of his allegations.

Webb's complaint was referred to a magistrate judge for pretrial proceedings and, on February 3, 2006, Respondents sought dismissal or, alternatively, summary judgment. (Appendix at A-4). Respondents also filed affidavits to "demonstrate they have made sure Mr. Webb has received all necessary medical treatment."

In opposition to Respondents' Motion to Dismiss or for Summary Judgment, Webb filed additional evidence, including a fifteen-page affidavit, disputing material contentions set out in the Respondents' affidavits. Respondents did not reply, leaving Webb's opposition unrebutted.

On June 23, 2006, the magistrate judge issued a Report and Recommendation. (Appendix at A-37 through A-69). The magistrate judge concluded that Webb's deliberate indifference claim failed for lack of evidentiary support. (*Id.*)

In short, despite that this action had not progressed beyond the pleading stage, discovery had not commenced, Webb had presented genuine disputed issues of material fact on the substance of his claims, and the governing standard of review dictated a denial, the magistrate judge recommended that the district court grant Respondents' motion for summary judgment against Webb and dismiss the case.

Webb objected and, despite his *pro se* status, advanced the argument to the district court that summary judgment was improper, given that no discovery had occurred and that it had to review all facts, and reasonable inferences drawn therefrom, in a light most favorable to him. Webb also correctly contended that the district court could not resolve factual disputes at this stage, but merely could decide whether he had presented any triable claims or claims that should proceed to discovery.

On July 24, 2006, the district court entered a final order adopting the magistrate's Report and granting summary judgment to the Respondents on Webb's constitutional claims. (Appendix at A-30 through A-36). Webb timely noted an appeal. (Appendix at A-5).

After considering oral argument and briefs of the parties, a panel of the Fourth Circuit Court of Appeals affirmed the ruling of the district court in an unpublished per curium decision. *Webb v. Hamidullah*, 281 F. App'x 159, 2008 WL 2337608 (4th Cir., June 6, 2008) (Appendix at A-1 through A-29). While it concluded that "certain issues surrounding Webb's hernia-related Eighth Amendment claim are worthy of a more thorough analysis," the panel summarily rejected the majority of Webb's appellate contentions. (*Id.* at A-5).

In its *de novo* review of the district court ruling, the panel found that (1) "Dr. Vendel's classification of Webb's potential surgery as elective – rather than as an emergency – does not implicate

Webb's Eighth Amendment rights"; (2) Webb failed to establish that the "delay" in his surgery caused him substantial harm; and (3) that the prison medical director overseeing Webb's care, Dr. Vendel, "has not been shown to subjectively know that Webb did not have a hernia belt," which Dr. Vendel himself had directed be ordered for Webb. (Appendix at A-17 through A-23).

Judge Gregory dissented from the panel's findings, concluding that Webb presented evidence, when viewed in a light most favorable to him, sufficient to create a triable issue of material fact as to whether the Respondents' delay in providing medical treatment to Webb constitutes deliberate indifference. Judge Gregory stated:

> Webb has waited over four years to have an "extremely enlarged incisional ventral hernia" removed – a surgery prison medical staff determined could "electively" be done within six months. It is undisputed that the surgery is necessary, and the only accepted medical procedure for remedying Webb's serious condition. However, as Webb lingers, the majority . . . holds that, as a matter of law, the prison medical staff has not been "deliberately indifferent" to his serious medical need to have surgery "absent some resultant harm or a worsened condition." (Maj. Op. 17.) The Eighth Amendment does not require a prisoner to be on the precipice of death to receive the

> necessary treatments that the prison medical staff itself prescribed.

(Appendix at A-24).

In his dissent, Judge Gregory pointed out that the Fourth Circuit has held, albeit in an unpublished opinion, that where prison officials are aware of a serious medical need and delay treatment, the plaintiffs' allegations are sufficient to establish deliberate indifference. *Id.*, citing *Clinkscales v. Pamlico Corr. Facility*, 238 F.3d 411, 2000 WL 1726592 (4th Cir. 2000) (citing *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346-47 (3d Cir. 1987). (Appendix at A-26 through A-27).

Because the panel's decision conflicts with another Fourth Circuit decision (unpublished) and a published Third Circuit decision cited therein, Webb respectfully requests his petition for a writ of certiorari be granted.

II. Facts

Webb is a fifty-year-old African-American male serving his sentence at the Hazelton federal penitentiary in West Virginia, where he was involuntarily transferred during this litigation. (Appendix at A-5 through A-6). This action relates to claims of constitutional and statutory violations that occurred while Webb was housed at a federal institution in Estill, South Carolina.

In May 2001, Webb had emergency surgery for a ventral hernia after suffering hernia

complications and kidney failure. (Appendix at A-6). In September 2003, a surgical consultant observed that scar tissue from Webb's 2001 surgery was infected and recommended surgical repair. (*Id.*)

In December 2003, a second surgical consultation revealed that Webb had "an extremely enlarged ventral incisional hernia" and required "surgical intervention" to excise scar tissue that "inhibited and hindered potential success for repair." (*Id.*)

On January 2, 2004, Webb was scheduled for surgery at an off-site hospital. However, he refused to be transported to the hospital by the officer assigned to him. (Appendix at A-6 through A-7). Because Webb had previously filed grievances against the officer and because he knew that the officer would be armed, Webb stated that he feared being incapacitated in the presence of this guard.

Rather than reschedule Webb's surgery, prison officials asked Webb to sign a Medical Treatment Refusal form providing that Webb had rejected medical treatment. The form, which became part of Webb's medical file, advised that failure to undergo surgery could result in the worsening or strangulation of his hernia, a bowel obstruction, or death. (Appendix at A-6 through A-7). Webb would not sign the form because he was not refusing medical treatment, but, rather, wanted a different escort to and from surgery.

On June 16, 2004, the Federal Bureau of Prisons transferred Webb to FCI-Estill. (Appendix

at A-7). During a routine physical examination shortly after his arrival, Webb notified prison officials about his various medical conditions, including his ventral hernia. (*Id.*) Webb requested follow-up medical care and treatment for his hernia, including a new abdominal binder (or hernia belt) to help control it.

In July 2004, a consulting general surgeon recommended that Webb have laparoscopic surgery to correct his ventral hernia. (Appendix at A-8). Vendel did not schedule surgery, but rather, noted in Webb's medical charts that Webb demanded hernia surgery; that he had refused surgery in January 2004; and that the consulting surgeon recommended hernia repair but did not indicate that it was "medically necessary." (Appendix at A-9).

In September 2004, Webb complained about abdominal pain that was "extreme at times" and later noted that he was suffering from "severe" abdominal pain due to his work assignment. (Appendix at A-9, n.9). On September 29, 2004, Webb was examined by another consulting surgeon who observed a "new bulge on [Webb's] abdomen" that was "not painful" but had increased in size over the prior two years. (Appendix at A-10). The surgeon recommended a laparoscopic repair of the hernia with "at least 3 to 4 days in the hospital." (*Id.*)

In October, 2004, Webb again complained to Vendel of abdominal pain. (Appendix at A-10). Vendel responded that Webb would be scheduled electively at some unspecified future time for

surgery. He noted in Webb's file that "the surgery is not urgent, [and] can be done electively within a time frame of 6 [months]." (*Id.*)

On October 13, 2004, Webb requested a hernia belt, stating that he was suffering "serious pain and discomfort, due to the worn and old Binder I am currently forced to wear." (Appendix at A-10 through A-11). His complaint led only to Vendel charting that elective surgery would be scheduled. (*Id.*)

In May 2005, Webb filed an informal prison complaint asserting hernia enlargement and requesting to be relieved from his work assignment until surgery was performed. (Appendix at A-11). Webb's request was denied.

In June 2005, Webb requested surgery "with imminence." (Appendix at A-11 through A-12).

On August 3, 2005, Vendel referred Webb, after complaints of extreme pain, to an orthopedic surgeon for a second opinion. (Appendix at A-26). On March 10, 2006, another orthopedic surgeon confirmed that Webb's hernia had increased and surgery was needed. (*Id.*)

It was not until April 27, 2006, nearly three years after surgery was first recommended and five months after Webb filed suit that Vendel recommended surgery be scheduled. (*Id.*)

In April 2006, Vendel recommended the proposed surgery be scheduled, and recently, nearly

five years after surgery first was recommended in September 2003, Webb's hernia was surgically reduced.

REASONS FOR GRANTING THE WRIT

I. Webb Has Established Deliberate Indifference.

The Fourth Circuit determined as a matter of law that the prison medical staff at FCI-Estill was not "deliberately indifferent" to Webb's serious medical need to have surgery "absent some resultant harm or a worsened condition." However, as Judge Gregory pointed out in his dissent, "[t]he Eighth Amendment does not require a prisoner to be on the precipice of death to receive the necessary treatments that the prison medical staff itself prescribed." (Appendix at A- 24). (Emphasis added.)

According to this Court, to make out a claim the prisoner must show that the prison officials acted with deliberate indifference to his serious medical needs, which requires proof of two elements: (1) that the deprivation of medical care was sufficiently serious (objective component); and (2) that the prison officials were deliberately indifferent to the serious medical needs (subjective component). *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). As Webb argued to the Fourth Circuit, the fact that some sort of medical treatment is provided does not insulate defendants at the pleading stage from claims of deliberate indifference. *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978).

It is undisputed that Webb's hernia condition

is a serious medical need. (Appendix at A-16) ("it is undisputed that Webb suffers from a ventral hernia and that, in the proper circumstances, such a condition might be recognized as serious") (Maj. Op.); (Appendix at A-25) ("[i]t is undisputed that Webb's hernia condition is a serious medical need") (in dissent). The only question remaining is whether there is material evidence in dispute that prison officials were deliberately indifferent to Webb's medical needs. *See Estelle*, 429 U.S. at 104.

Here, a consulting general surgeon recommended that Webb receive "laparoscopic ventral hernia surgery" in September 2003. (Appendix at A-6). A year later, based on the allegedly reducible nature of the hernia, Vendel deemed Webb's surgery "elective," *i.e.*, "not urgent," and posited that surgery could be performed within six months of September 24, 2004. However, only five days after Vendel's determination, a second consulting physician observed "a new bulge on [Webb's] abdomen" that had increased in size and recommended laparoscopic repair. (Appendix at A-25 through A-26).

As the panel majority correctly noted, Webb complained thirteen times of chronic abdominal pain, and two different specialists recommended surgery during the course of two years after the initial recommendation. Yet, surgery still was delayed and its scheduling was not even discussed during the six months following Vendel's assessment that surgery could wait as long as six months. Years later, the surgery still had not occurred. As Judge Gregory concluded, "[i]t is clear that Webb did not

receive the treatment that was prescribed year after year by several surgeons despite his chronic pain and medical infirmities." (Appendix at A-26).

II. The Panel's Decision Conflicts With an Unpublished Decision of The Fourth Circuit and a Published Decision of Another Circuit.

The Fourth Circuit Court of Appeals has held, in an unpublished opinion, that where prison officials are aware of a serious medical need and delay treatment, the plaintiff's allegations are sufficient to establish a submissible claim of deliberate indifference. *Clinkscales v. Pamlico Corr. Facility*, 238 F.3d 411, 2000 WL 1726592 (4th Cir. 2000) (citing *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346-47 (3d Cir. 1987) (prison officials may not interminably delay medical treatment or deny treatment based on arbitrary and burdensome procedures).

Here, Webb has presented evidence, when viewed in a light most favorable to him, more compelling than that in *Clinkscales* and *Lanzaro*, sufficient to create a triable issue of material fact whether the delay of needed medical treatment for nearly five years constitutes deliberate indifference. Deliberate indifference does not turn on whether the inmate's condition worsened during the delay; it is the delay, itself, that is deliberately indifferent. *See Estelle*, 429 U.S. at 104-05.

Because Webb alleged facts sufficient to support his claim under the law of the fourth and the third circuits, the panel decision to affirm the

district court's entry of summary judgment for the Respondents should be reviewed.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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CHARLES GRUBBS, UNIT MANAGER,
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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-7381

WILLIAM EUGENE WEBB,

Plaintiff - Appellant,

v.

MATTHEW B. HAMIDULLAH, Warden; Z. R. VENDEL, M.D., Medical Director; STEVE LABIER, Unit Manager; CHARLES GRUBBS, Unit Manager; UNITED STATES OF AMERICA,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Henry F. Floyd, District Judge. (0:05-cv-02546-HFF)

Argued: February 1, 2008 Decided: June 6, 2008

Before MOTZ, KING, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion. Judge Gregory wrote a dissenting opinion.

ARGUED: William Harrison Baxter, II, MCGUIREWOODS, L.L.P., Richmond, Virginia, for Appellant. Barbara Murcier Bowens, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellees. **ON BRIEF:** Reginald I. Lloyd, United States Attorney, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

William Eugene Webb, a federal inmate, appeals from the district court's order awarding summary judgment to several officials of the Federal Correctional Institute in Estill, South Carolina ("FCI-Estill"), on Webb's Eighth Amendment claims of cruel and unusual punishment. See Webb v. Hamidullah, No. 0:05-cv-02546 (D.S.C. July 24, 2006) (the "Order").[1] Webb maintains that the award of summary judgment was made erroneously, because he had demonstrated that the Defendants were deliberately indifferent to his medical needs, and that they had retaliated against him.[2] As explained below, we reject Webb's contentions and affirm.

I.

A.

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[1] The Order is found at J.A. 651-54. (Citations to "J.A. " refer to the contents of the Joint Appendix filed by the parties in this appeal.)

[2] Webb's constitutional claims are pursued under the authority of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), against four Defendants (all FCI-Estill officials), namely: Matthew B. Hamidullah, Warden; Z. R. Vendel, M.D., Clinical Director; Steven LaBier, Unit Manager; and Charles Grubbs, Counselor. A separate tort claim being pursued against the United States was dismissed by the district court without prejudice, and that dismissal is also challenged on appeal.

In September 2005, Webb filed a pro se complaint against the Defendants in the District of South Carolina, alleging that their deliberate indifference to his medical needs and acts of retaliation violated his Eighth Amendment rights. In an amended pro se complaint filed on October 6, 2005, Webb restated his constitutional claims and alleged an additional claim under the Federal Tort Claims Act (the "FTCA claim"). His claims center on alleged medical care deficiencies related to (1) a hernia condition, (2) left forearm problems, and (3) a foot deformity, as well as retaliatory and medically inappropriate prison work assignments. He sought compensatory and punitive damages, as well as injunctive relief, such as proper medical care.

Webb's complaint was referred to a magistrate judge for pretrial proceedings and, on February 3, 2006, the Defendants sought dismissal or, alternatively, summary judgment. After ordering the Defendants to submit additional evidence, the magistrate judge assessed the dispositive motion and, on June 23, 2006, issued his Report and Recommendation. See Webb v. Hamidullah, No. 0:05-cv-02546 (D.S.C. June 23, 2006) (the "Report").[3] The Report recommended to the district court that summary judgment be awarded to the Defendants on Webb's constitutional claims, and that the FTCA claim be dismissed without prejudice.

On July 24, 2006, the district court entered the Order giving rise to this appeal, first ruling that Webb had failed to exhaust his administrative

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[3] The Report is found at J.A. 610-36.

remedies on the FTCA claim as it related to the conduct of officials at FCI-Estill. The court thus dismissed the FTCA claim without prejudice.[4] The Order also granted summary judgment to the Defendants on Webb's constitutional claims, adopting the Report of the magistrate judge.

Webb timely noted an appeal from the district court's rulings, and we possess jurisdiction pursuant to 28 U.S.C. § 1291. Although Webb initially proceeded pro se, we subsequently appointed counsel to represent him on appeal. Having carefully considered all of Webb's appellate contentions, we summarily reject the majority of them. We conclude, however, that certain issues surrounding Webb's hernia-related Eighth Amendment claim are worthy of a more thorough analysis, and we therefore dedicate the balance of this opinion to those issues.

B.

1.

Webb, who is fifty years old, is presently serving a 355-month prison sentence, imposed on him in March 2001 in the Middle District of North

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[4] The United States was not designated as a defendant in the amended complaint, the Report, or the Order. It was, however, named as a defendant in the Judgment Order of July 25, 2006. The Judgment Order correctly named the United States, the only proper defendant in the FTCA claim. See 28 U.S.C. § 2674.

Carolina. His medical conditions, which include what is known as a ventral hernia, stem from several gunshot wounds.[5] While awaiting his initial designation to a federal prison facility, Webb was hospitalized for hernia complications and kidney failure. He received emergency hernia surgery on May 10, 2001, and was transferred soon thereafter to the Springfield, Missouri, prison medical facility. With the exception of a few weeks in early 2003, Webb was at Springfield until January 2004.

In September 2003, a surgical consultant at Springfield observed that scar tissue from Webb's 2001 hernia surgery was infected, and recommended surgical repair. A second surgical consultation in December 2003 revealed that Webb had "an extremely enlarged ventral incisional hernia," and required "surgical intervention" to excise scar tissue that "inhibited and hindered potential success for repair." J.A. 308. Webb was scheduled for such surgery on January 2, 2004, at an off-site hospital. On the morning of surgery, however, he refused to be transported to the hospital, apparently due to animosity towards the correctional officer who was to accompany him. Webb also refused to sign a Medical Treatment Refusal form that alerted him to the possible consequences of foregoing surgery,

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[5] In an affidavit of January 10, 2006, Dr. Vendel defines a hernia as "the protrusion of an organ or tissue through a weak area in the muscles or tissue that surround and contain it." J.A. 314. A ventral hernia occurs "on the front wall of the abdomen," generally resulting from the breakdown of muscles near an old incision. Id. at 315.

including "worsening of hernia, strangulation of hernia, bowel obstruction, death." Id. at 311. His prison medical file simply reflects that Webb "refused surgery." Id. at 309.

2.

Webb was transferred from Springfield to FCI-Estill on June 16, 2004. During a routine physical examination soon thereafter, FCI-Estill officials learned of Webb's medical conditions, including his ventral hernia. Prison records indicate that Webb did not complain of chronic pain at the intake screening. He was initially assigned to work as a yard orderly -- an assignment that required him to pick up or sweep trash around the facility, occasionally mow and trim grass, and sweep sidewalks. Dr. Vendel, the Clinical Director at FCI-Estill, oversaw the treatment of Webb's medical problems.

Webb contends that, less than a week after his arrival at FCI-Estill, he began requesting follow-up medical care and treatment for his hernia problem, including the provision of a new abdominal binder (or hernia belt) to control it.[6] The details of Webb's medical condition, as documented in the FCI-Estill records, are
summarized as follows:

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[6] In Webb's affidavit and in the medical records, the terms "hernia belt" and "abdominal binder" appear to be used interchangeably.

- On July 21, 2004, Webb was placed on convalescent status for one week.[7]

- On July 30, 2004, a consulting general surgeon recommended "laparoscopic ventral hernia [surgery]." J.A. 356. According to notations in Webb's medical file dated August 2, 2004, Webb was advised that he "needs surgery of ventral hernia," and apparently requested "convalescence until surgery." Id. at 43. Webb was placed on idle status for two weeks between August 20 and September 3, 2004.[8]

- On September 7, 2004, Webb was reassigned to work as a unit orderly, wiping down walls and handrails, with two restrictions: "no lifting over 10 lbs" and "no prolonged standing." J.A. 165.

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[7] Convalescent status, as defined on FCI-Estill work classification forms, refers to a "[r]ecovery period for operation, injury, or serious illness," during which convalescing inmates enjoy "full institutional privileges and limited recreational privileges, subject only to medical limitation." J.A. 163.

[8] Idle status, as defined by FCI-Estill, refers to a "[t]emporary disability." J.A. 163. Inmates on idle status are "restricted to [their] room except for meals, religious services, [and] sick call," with no recreational privileges. Id. at 65.

- At least twice in September 2004, Webb complained of extreme abdominal pain.[9]

- On September 24, 2004, Dr. Vendel noted that Webb demanded hernia surgery; that he had refused surgery in January 2004; that his hernia condition was reducible; that he had a hernia belt; and that "[o]ur consultant [in July 2004] recommended hernia repair but did not indicate that it was medically necessary." J.A. 330.[10] Dr. Vendel sought a second surgical

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[9] On September 18, 2004, Webb complained that he was "experiencing abdominal pain" that was "extreme at times." J.A. 59. On September 20, 2004, Webb added that his extreme pain had continued "for months." Id. at 60. On September 27, 2004, Webb reported that he had injured himself while working: "My Hernia is causing me severe pain and my broken arm and dislocated wrist-joint, has swollen and causes me severe pain." Id. at 65.

[10] "Dr. Vendel has explained that a reducible hernia exists when the protruding organ, tissue, or fat "can be pushed back into the abdominal cavity," causing the hernia to "flatten and disappear." J.A. 315. By contrast, a non-reducible hernia cannot be pushed back in; it "requires surgical repair, because the protrusion can contain intestine, which can lose its blood supply and die if it become[s] tightly trapped." Id.

consultation "about timing the hernia repair and probability of recurrence." Id.[11]

- On September 29, 2004, Webb was examined by another consulting surgeon, who observed a "new bulge on [Webb's] abdomen," that was "not painful" but had increased in size over the prior two years. J.A. 357. The surgeon recommended "a laparoscopic repair" of the hernia, with "at least 3 to 4 days in the hospital." Id. at 358.

- On October 1, 2004, Dr. Vendel examined Webb again, noting complaints of constipation and abdominal pain, but concluding that he "appeared not [to be] in acute distress." J.A. 331.

- On October 4, 2004, Dr. Vendel recorded a treatment plan in Webb's file: "I have discussed this case [with] the g[eneral] surgeon. We agreed that the surgery is not urgent, [and] can be done electively within a time frame of 6 [months]." J.A. 332.

- On October 13, 2004, Webb requested a new abdominal binder "to replace the extremely worn abdominal binder, to-which [sic] I am currently forced to wear daily." J.A. 64. Webb complained that his

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[11] On September 24, 2004, Dr. Vendel noted that Webb had "refused surgery" in January 2004; Dr. Vendel also recommended performing "herniotomy, electively." J.A. 360.

old binder was "the only thing slowing the enlargement of this hernia," and that "the hernia is currently causing me serious pain and discomfort, due to the worn and old [blinder I am currently forced to wear." Id. In responding, Dr. Vendel did not mention Webb's request for an abdominal binder, but confirmed, "[y]ou are going to be scheduled for surgery, electively." Id.

- On December 21, 2004, the medical staff examining Webb on a flu-related visit noted that his hernia was reducible, and that he did not complain of any pain. J.A. 336.

- On March 8, 2005, Dr. Vendel noted that Webb's "reducible" hernia was causing "mild pain," and prescribed pain medication. J.A. 340-41.

- On April 28, 2005, Webb's medical restrictions of "light duty" and "no prolonged standing" were renewed due to his hernia condition. J.A. 342.

- On May 25, 2005, Webb filed an informal prison complaint, asserting hernia enlargement and requesting to be relieved from his work assignment until elective hernia surgery was performed. J.A. 91. Webb's request was denied.

- On June 21, 2005, Webb filed another informal complaint, requesting that he be

provided with hernia surgery "with imminence." J.A. 90.

- On June 23, 2005, Webb filed yet another informal complaint, asserting that his work assignment aggravated his abdominal condition, and requesting "convalescent [i]dle [s]tatus." J.A. 218.

- On August 3, 2005, Dr. Vendel re-examined Webb. Although Webb complained of extreme pain, Dr. Vendel observed no objective signs of such pain — "no tachycardia, no sweating, no facial expression other than being angry" -- and rated Webb's pain level at 6 on a scale of 0 to 10. J.A. 345. Dr. Vendel noted that the size of Webb's hernia was "unchanged," and that the bulge was "easily reduced." Id. He acknowledged that Webb "may need a new hernia belt," and referred him to an orthopedic surgeon for a second opinion. Id.

- Prison records dated August 10, 2005, reflect that "one hernia belt [was] provided" to Webb. J.A. 583.

- On August 24, 2005, Dr. Vendel examined Webb again, noting mild pain and no change in the size of his reducible hernia. Concerning treatment, Dr. Vendel wrote that Webb "may have [an] abdominal hernia belt." J.A. 349.

- In his January 10, 2006 affidavit, Dr. Vendel stated that Webb's hernia was "still reduceable [sic] and controlled with the use of a hernia belt." J.A. 316.

- On February 9, 2006, Webb filed another informal prison complaint, alleging that he had requested an abdominal binder on arriving at FCI-Estill; that on August 10, 2005, he was issued a "back-brace," not a hernia belt; and that the back brace "doesn't help at all." J.A. 584. Webb requested to be "promptly provided the abdominal binder as ordered by Dr. Vendel [ ] about July and/or August of 2005." Id.

- On March 2, 2006, FCI-Estill staff met with Webb and confirmed that "a new binder was ordered to replace your old binder . . . and upon receipt will be issued to you." J.A. 584.

- In his affidavit of March 28, 2006, Webb stated that he "was never provided with a hernia belt." J.A. 398.

- On March 30, 2006, Dr. Vendel examined Webb again. On April 27, 2006, he noted in Webb's medical records that Webb's hernia was a "5 x 4 cm bulge, minimally symptomatic," and that "surgery can be done as I approved it before[,] electively." J.A. 586. That same day, Dr. Vendel recommended that the proposed elective surgery be scheduled.

- In his affidavit of May 8, 2006, Dr. Vendel stated that Webb was issued a hernia belt on August 10, 2005, and that "on March 2, 2006, a new hernia belt was ordered and Mr. Webb was instructed that once it arrived it would be issued to him." J.A. 578. Vendel noted that he had requested Webb's hernia surgery be scheduled, "although this surgery is an elective procedure." Id.

Addressing the hernia claim allegations in the Report, the magistrate judge concluded that Webb had presented no evidence suggesting that surgery was medically required (rather than properly deemed elective), or that surgery had been unduly delayed. See Report 18-20. The magistrate judge further determined that Webb's assertion "that he was never provided with a hernia belt is . . . contradicted by the medical records," and that, "even assuming there was a delay in [Webb's] receipt of a hernia belt, . . . the medical evidence before the Court shows that [Webb's] hernia remains reducible, with no evidence having been presented that [Webb] has suffered any injury as a result of the delay in receiving a hernia belt." Id. at 20. The Order adopted this aspect of the Report without specific comment.

II.

We review de novo a district court's award of summary judgment. See Wolfe v. Weisner, 488 F.3d 234, 238 (4th Cir. 2007). In so doing, we apply the same standard as the district court: whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In conducting such a review, we are mindful that a mere "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, in determining whether a genuine issue of material fact is in dispute, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

III.

On appeal, Webb challenges the district court's award of summary judgment to the Defendants on his Eighth Amendment claim with respect to his hernia problems -- asserting that his medical care was so deficient as to constitute deliberate indifference to his objectively serious medical needs. See U.S. Const. amend VIII; Estelle v. Gamble, 429 U.S. 97, 104 (1976). As a general proposition, a medical need may be deemed objectively serious if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980); see also Loe v. Armistead, 582 F.2d 1291, 1292-93, 1295-96 (4th Cir. 1978). In order to act with deliberate indifference, a public official must have been personally aware of facts indicating a substantial risk of serious harm, and the official must have actually recognized the existence of such

a risk. Farmer v. Brennan, 511 U.S. 825, 838 (1994) ("[An official's failure to alleviate a significant risk that he should have perceived but did not . cannot under our cases be condemned as the infliction of punishment."); see also Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990).

In this situation, it is undisputed that Webb suffers from a ventral hernia and that, in the proper circumstances, such a condition might be recognized as serious. See, e.g., Johnson v. Doughty, 433 F.3d 1001, 1014 (7th Cir. 2006) (holding that hernia can be objectively serious medical problem); Jones v. Johnson, 781 F.2d 769, 771-72 (9th Cir. 1986) (same). In the context of his constitutional claim, Webb contends that the Defendants were deliberately indifferent to his medical needs in three respects: (1) in prescribing hernia surgery on an elective basis only; (2) in unduly delaying such surgery; and, (3) in failing to provide him with the hernia belt that he needed.[12] We review in turn these aspects of Webb's claim.

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[12] In his hernia-related claim, Webb's allegations of deliberate difference relate only to Dr. Vendel. He does not allege that the other Defendants bear any liability for Dr. Vendel's acts or omissions. In the absence of allegations of supervisory liability, the district court properly awarded summary judgment to the other Defendants. See Boyce v. Alizaduh, 595 F.2d 948, 953 (4th Cir. 1979).

A.

Webb first maintains, in pursuing his Eighth Amendment claim, that the Defendants were deliberately indifferent to his need for surgery by prescribing such surgery for him on an elective basis only. Although the consequences of failing to prescribe an essential surgical procedure can be serious, any medical malpractice committed with respect thereto, or malpractice committed by mischaracterizing an emergency surgical procedure as an elective one, will not contravene the Eighth Amendment. Put simply, negligent medical diagnoses or treatment, without more, do not constitute deliberate indifference. See Sosebee v. Murphy, 797 F.2d 179, 181 (4th Cir. 1986).

And, in this case, Webb has failed to show any deliberate indifference on the part of Dr. Vendel with respect to the "elective surgery" classification of Webb's hernia problem. The record reflects that, shortly after Webb's transfer to FCI-Estill, Dr. Vendel sought and obtained supporting medical opinions classifying Webb's surgery as elective. Based on those consultations, Dr. Vendel himself concluded, in October 2004, that Webb's need for hernia surgery was "not urgent, [and] can be done electively within a time frame of 6 [months]." J.A. 339. After Webb filed informal prison complaints in May and June 2005, requesting hernia surgery "with imminence," id. at 90, Dr. Vendel examined Webb twice in August 2005, but found no objective signs of pain and no change in the size of his hernia. In March 2006, after examining Webb's hernia and finding it unchanged, Dr. Vendel renewed his

assessment that the "surgery can be done as I approved it before, electively." Id. at 586.

In summary, even if Dr. Vendel somehow misdiagnosed Webb's need for surgery, Dr. Vendel made extensive efforts to diagnose, monitor, and control Webb's hernia symptoms, and that he did not disregard any "risk of harm of which he was aware." See Johnson v. Quinones, 145 F.3d 164, 168 (4th Cir. 1998) (holding that doctors are only deliberately indifferent if they "subjectively 'know[] of' the serious medical condition itself" and consciously disregard a substantial risk of serious harm implied by that condition). The fact that Dr. Vendel consulted other physicians further undermines any contention that his diagnosis, even if incorrect, was somehow deliberate or indifferent. See id. at 169 (concluding prison physician's consultation with outside experts supported inference that misdiagnosis was not deliberate indifference). Thus, the court properly concluded in its Order that Dr. Vendel's classification of Webb's potential surgery as elective — rather than as an emergency — does not implicate Webb's Eighth Amendment rights.

B.

Turning next to the delay aspect of Webb's Eighth Amendment claim, he argues that the fact that he was never scheduled for elective hernia surgery while at FCI-Estill — despite Dr. Vendel's statement, in October 2004, that "surgery is not urgent, [and] can be done electively within a time frame of 6 [months]," J.A. 332 — supports an inference of deliberate indifference on the part of Dr. Vendel. Under the applicable legal principles, a

significant delay in the treatment of a serious medical condition may, in the proper circumstances, indicate an Eighth Amendment violation. See Estelle, 429 U.S. at 104-05 (holding that deliberate indifference may be demonstrated by "intentionally denying or delaying access to medical care").

An Eighth Amendment violation only occurs, however, if the delay results in some substantial harm to the patient.[13] Thus, in order to defeat summary judgment on the delay issue, Webb was obligated to establish that the delay in his surgery caused him substantial harm — evidenced by, for example, a marked increase in his hernia's size, frequent complaints of severe pain, or signs that his hernia was becoming non-reducible or incarcerated.[14] *Cf.* Militier v. Beorn, 896 F.2d 848,

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[13] See, e.g., Sealock v. Colorado, 218 F.3d 1205, 1210 (10th Cir. 2000) ("Delay in medical care only constitutes an Eighth Amendment violation where the plaintiff can show that the delay resulted in substantial harm."); Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993) (same); Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990) (same). But see Blackmore v. Kalamazoo County, 390 F.3d 890, 899 (6th Cir. 2004) ("This [constitutional] violation is not premised upon the 'detrimental effect' of the delay, but rather that the delay alone in providing medical care creates a substantial risk of serious harm [of which prison officials are aware].")

[14] In his affidavit of January 10, 2006, Dr. Vendel explains that "[a] non-reducible hernia requires surgical repair, because the protrusion can

852-53 (4th Cir. 1990) (concluding, where inmate suffered heart attack and died, that jury could find physicians were deliberately indifferent by failing to follow up on recommendations for inmate's cardiac care).

Our unpublished decisions recognize that a delay with respect to hernia surgery does not necessarily constitute deliberate indifference, absent some resultant harm or a worsened condition. For example, in Price v. Carey, we deemed an eight-month delay in providing elective hernia surgery as insufficient to constitute an Eighth Amendment violation, because the prisoner "did not present any information" to his physician during the intervening period "to indicate that his situation was an emergency mandating immediate treatment." No. 91-6643, 1992 WL 34208, at *4 (4th Cir. Feb. 26, 1992). On the other hand, in Garrett v. Elko, we recognized an Eighth Amendment claim where the prisoner's hernia surgery was delayed for four years, in the face of continual "complaints of intense pain, anxiety, and limited mobility." No. 95-7939, 1997 WL 457667, at *1 (4th Cir. Aug. 12, 1997).

After October 2004, Webb was prescribed pain medication, and although he frequently complained about hernia-related discomfort, his complaints focused largely on work assignments. See, e.g., J.A. 91 (complaining of hernia enlargement on May 25,

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contain intestine, which can lose its blood supply and die if it becomes tightly trapped (called 'strangulation' or 'incarceration' of the hernia)." J.A. 315.

2005, but requesting reprieve from work assignment until elective surgery is performed); id. at 90 (requesting, on June 21, 2005, being provided hernia surgery "with imminence," but failing to assert pain or change in hernia's size as basis therefor); id. at 218 (complaining of increasing pain on June 23, 2005, making work impossible). Moreover, when Webb informed the prison medical personnel that he was in pain, they did not ignore his complaints. Rather, they monitored his condition, observed no objective signs of pain or change in the size of his hernia, provided pain medications, and concluded that the hernia was yet reducible. See J.A. 331 (examining Webb on October 1, 2004, and noting that, despite his complaints of constipation and abdominal pain in September 2004, he "appeared not [to be] in acute distress"); id. at 341 (prescribing pain medication on March 8, 2005, for "mild pain" caused by Webb's hernia); id. at 345 (examining Webb on August 3, 2005, and observing no objective signs of pain or change in size of hernia); id. at 349 (examining Webb on August 24, 2005, and observing no change); id. at 586 (noting that, based on March 30, 2006, examination, Webb's hernia was "minimally symptomatic"). In such circumstances, Webb's allegation of improper delay fails to support the proposition that summary judgment was improperly awarded.

C.

Finally, Webb focuses on the assertion that he was never provided with a hernia belt at FCI-Estill. In addressing this issue, Webb maintains that the

magistrate judge and the district court failed to construe the evidence in the light most favorable to him. In the Report (adopted by the Order), the magistrate judge concluded that Webb's assertion that he was never provided with a replacement hernia belt was "contradicted by the medical records." Report 20. On this point, the issue is simply whether Webb has shown that Dr. Vendel acted with deliberate indifference concerning the hernia belt. In his affidavit of May 8, 2006, Dr. Vendel states that "on August 10, 2005, [Webb] was issued a hernia belt by the Health Services Administrator." J.A. 578. By contrast, in an informal prison complaint of February 9, 2006, Webb alleged that, although he had requested a new belt when he first arrived at FCIE still in July 2004, he had been given a back brace only (on August 10, 2005).[15] And, in his affidavit of March 28, 2006, Webb asserted that he "was never provided with a hernia belt." Id. at 398.

This apparent dispute of fact on whether Webb received a back brace or a hernia belt on August 10, 2005, fails to establish an Eighth Amendment claim. Put succinctly, Webb failed to complain about the inadequacy of the back brace until February 2006, six months after it was issued

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[15] There is no explanation of the differences, if any, between a "back brace," an "abdominal binder," and a "hernia belt." For our purposes, we construe these terms in the light most favorable to Webb, and deem a back brace to be distinct from -- and less effective than -- an abdominal binder or a hernia belt.

to him (on August 10, 2005). In the interim, Dr. Vendel believed that Webb was provided with a hernia belt on August 10, 2005. See J.A. 578 ("[O]n August 10, 2005, [Webb] was issued a hernia belt by the Health Services Administration."). Whether Dr. Vendel was incorrect in this perception could be relevant in a malpractice claim, but it is not material to Webb's Eighth Amendment claim. As a matter of law, Dr. Vendel cannot have consciously disregarded a substantial risk of serious harm to Webb if he did not know that Webb had been provided an ineffectual back brace. See Johnson v. Quinones, 145 F.3d 164, 168 (4th Cir. 1998) (holding that, for purposes of establishing deliberate indifference, "[t]he correct question is whether the doctor subjectively 'knows of the serious medical condition itself"). On this evidence, Dr. Vendel has not been shown to subjectively know that Webb did not have a hernia belt, and thus could not be deliberately indifferent to any of Webb's hernia-related medical needs. As a result, Dr. Vendel cannot be liable on the Eighth Amendment claim. In such circumstances, summary judgment was appropriate, and the Order of the district court must be affirmed.

IV.

Pursuant to the foregoing, we affirm the district court's award of summary judgment on Webb's Eighth Amendment claims, and also its dismissal without prejudice of his FTCA claim.

AFFIRMED

GREGORY, Circuit Judge, dissenting:

Webb has waited over four years to have an "extremely enlarged incisional ventral hernia" removed — a surgery prison medical staff determined could "electively" be done within six months. It is undisputed that the surgery is necessary, and the only accepted medical procedure for remedying Webb's serious condition. However, as Webb lingers, the majority, without pause or hesitation, holds that, as a matter of law, the prison medical staff has not been "deliberately indifferent" to his serious medical need to have surgery "absent some resultant harm or a worsened condition." (Maj. Op. 17.) The Eighth Amendment does not require a prisoner to be on the precipice of death to receive the necessary treatments that the prison medical staff itself prescribed.

The Eighth Amendment expressly prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. In Estelle v. Gamble, 429 U.S. 97, 104 (1976), the Supreme Court established the standard for Eighth Amendment cases involving prisoner medical needs. In order to prove an Eighth Amendment violation, the prisoner must show that the defendant acted with deliberate indifference to his serious medical needs, which requires proof of two elements: (1) that the deprivation of medical care was sufficiently serious (objective component); and (2) that the prison officials were deliberately indifferent to the serious medical needs (subjective component). Id. "[D]eliberate indifference entails something more than mere negligence," Farmer v. Brennan, 511 U.S. 825, 835 (1994), but indifference

can be manifested by prison doctors intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Estelle, 429 U.S. at 104-05.

It is undisputed that Webb's hernia condition is a serious medical need. See Martin v. Bowman, 48 F.3d 1216 (4th Cir. 1995) ("A medical need is serious if it is diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would recognize the necessity for a doctor's attention.") The majority's "deliberate indifference" analysis of Webb's Eighth Amendment claim is simple: rather than arguing that he received no medical treatment, Webb only alleges that Defendants conservative course of treatment violates his Eighth Amendment rights and since he was seen numerous times by prison medical staff and outside medical specialists, defendants were not deliberately indifferent. Simplicity notwithstanding, the majority errs.

In September, 2003, a consulting general surgeon recommended that Webb receive "laparoscopic ventral hernia surgery." (J.A. 356.) Based on the alleged reducible nature of the hernia, Dr. Vendel deemed Webb's surgery "elective;" that is, "not urgent" and he posited that surgery could be performed within six months of September 24, 2004. However, only five days after Dr. Vendel's determination that the surgery was "elective," Webb was examined by a consulting physician, who observed "a new bulge on [Webb's] abdomen," that had increased in size, and recommended laparascopic repair. (J.A. 358.) As the majority

correctly notes, Webb complained thirteen times of chronic abdominal pain, and two different specialists recommended surgery during the course of two years after the initial recommendation. Yet, surgery was still delayed and another six months passed without any discussion of scheduling Webb for surgery. While the majority makes much of Webb receiving treatment throughout this time and Dr. Vendel determining that the surgery was "elective," it is clear that Webb did not receive the treatment that was prescribed year after year by several surgeons despite his chronic pain and medical infirmities.

For instance, there is no evidence that Dr. Vendel, after the first six-months passed, determined that Webb could wait another six-months for surgery. In fact, the record suggests otherwise. On August 3, 2005, Dr. Vendel referred Webb, after complaints of extreme pain, to an orthopedic surgeon for a second opinion. It was not until April 27, 2006, nearly three years after surgery was first recommended and five months after Webb filed suit, that Dr. Vendel recommended surgery be scheduled. On March 10, 2006, another orthopedic surgeon confirmed that Webb's hernia had increased and surgery was needed. (J.A. 585.) To be sure, even if a procedure is "elective" - the term certainly should not mean that Webb must wait almost four years for a surgery that Dr. Vendel stated could be scheduled at the very least within six months.

We have held, albeit in an unpublished opinion, that where prison officials are aware of a serious medical need and delay treatment, the plaintiffs' allegations are sufficient enough to satisfy

the objective component of a deliberate indifference suit. See Clinkscales v. Pamlico Corr. Facility, 238 F.3d 411 (4th Cir. 2000) (inmate sufficiently alleged deliberate indifference as a result of defendant's nine-month delay in providing a necessary surgery) (citing Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346-47 (3d Cir. 1987) (prison officials may not interminably delay medical treatment or deny treatment based on arbitrary and burdensome procedures.)) Here, Webb presented evidence, when viewed in a light most favorable to him - as we must, sufficient to create a triable issue of material fact as to whether the delay constitutes deliberate indifference.

The majority's rationale to the contrary rings hollow in the face of the probability that further delay of Webb's hernia surgery could result in the worsening or strangulation of his hernia, bowel obstruction, or even Webb's death. (J.A. 311.) Deliberate indifference should not turn on whether Webb's condition worsened during the delay and nor should Dr. Vendel's decision to take an easier but less efficacious course negate deliberate indifference. It is the delay, itself, that is deliberately indifferent. As the Supreme Court stated in Estelle, an unreasonable delay or withholding of treatment can constitute deliberate indifference and, therefore, offend the Eighth Amendment. Estelle, 429 U.S. at 104-05.

It is uncontroverted that Webb suffers from a serious medical condition that requires surgery. Merely providing a prisoner with some treatment is not the Constitutional mandate of the Eighth

Amendment. Rather, it is providing a prisoner with the care he or she needs. Prisoners are deprived of freedom and stripped of most rights but the Eighth Amendment guarantees that they not be treated less than human. So I ask, is it humane for a prisoner, who has suffered for four years with a serious medical condition, to be waiting for a surgery that everyone agrees is necessary? Based upon the majority's reasoning, it is uncertain how long Webb must wait for medical treatment before he can make out an Eighth Amendment claim that would at least survive summary judgment. Because surely his protection under the Eighth Amendment has not deteriorated to such an anemic state, I dissent.

FILED: June 6, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 06-7381 (L)
(0:05-CV-02546-HFF)

WILLIAM EUGENE WEBB

Plaintiff - Appellant

v.

MATTHEW B. HAMIDULLAH, Warden; Z. R. VENDELL, M.D., Medical Director; STEVE LABIER, Unit Manager; CHARLES GRUBBS, Unit Manager; UNITED STATES OF AMERICA

Defendants - Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

WILLIAM EUGENE WEBB, Plaintiff, vs. MATTHEW B. HAIVIIDULLAH, Warden; Z.R. VENDEL, MD, Medical Director, STEVE LABEIR, Unit Manager; CHARLES GRUBBS, Unit Counselor; Defendants.	§ § § § § § § § § § § § §	CIVIL ACTION NO. 0:05-2546-HFF-BM

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S BIVENS ACTION, DISMISSING PLAINTIFF'S FTCA CLAIM WITHOUT PREJUDICE, AND DENYING PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF

I. INTRODUCTION

This case was filed as a *Bivens* and a Federal Tort Claims Act (FTCA) action. Plaintiff is proceeding *pro se*. The matter is before the Court for consideration of Plaintiff's requests for injunctive relief and a review of the Report and Recommendation (Report) of the United States

Magistrate Judge suggesting that the Court grant Defendants' Motion for Summary Judgment as to Plaintiff's *Bivens* action. The Magistrate Judge further recommends that the Court dismiss Plaintiff's FTCA claim, *without prejudice*. The Report is made in accordance with 28 U.S.C. § 636, and Local Rule 73.02 for the District of South Carolina.

II. INJUNCTIVE RELIEF

In considering a motion for injunctive relief, the Court is constrained to follow the balancing of hardship test as set forth in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189 (4th Cir. 1977). Simply stated, Plaintiff has failed to demonstrate that, under this standard, he is entitled to the extraordinary remedy he seeks. Accordingly, Plaintiff's requests for injunctive relief are **DENIED**.

III. THE REPORT

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on June 23, 2006. Plaintiff's objections were received by the Clerk of Court on July 14, 2006. The Court has made a careful review of Plaintiff s submission, but finds it to be unpersuasive.

Plaintiff contends that, contrary to the Report, he did respond (in his Response to Defendants' Motion to Dismiss) to Defendants' argument that he had failed to file a federal tort claim dealing with his conditions of confinement at FCI-Estill.[1] (Obj. 9.) The Court notes, however, that Plaintiff's response was a general assertion that he "filed an administrative tort claim regarding negligent medical care while at FCI Estill." (P1' s Resp. to Mot. Dism. 17 (citing Exhibit J).) Nevertheless, a review of Exhibit J shows that the documents contained therein are responding to Plaintiff's federal tort claim form that was signed on June 30, 2004. (Defts.' Mot. to Dism., Exh. 10.)

Plaintiff was transferred to FCI-Estill on or about June 16, 2004. The June 30, 2004, claim form was filed approximately two (2) weeks after Plaintiff arrived at FCI-Estill and prior to the dates on which Plaintiff complains about FCI-Estill. *Id.* Furthermore, in Section 8 of Plaintiff's claim form, he specifically states "that prison officials at U.S. Medical Center for Federal Prisoners at Springfield,

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[1] The references to FCI-Edgefield in the Report are scrivener's errors. Those portions of the Report that refer to FCI-Edgefield are, in fact, referring to FCI-Estill.

Missouri" were the ones that he was complaining of, with no mention of FCI-Estill. *Id.* Moreover, in Section 6 of the form, Plaintiff avers that the incidents complained of occurred between January 8, 2003, and January 28, 2004. *Id.* Since Plaintiff did not arrive at FCI-Estill until on or about June 16, 2004, Plaintiff cannot reasonably argue that the June 30, 2004, claim form covers any alleged claim that he may have against Defendants at FCI-Estill.

In sum, the documents before the Court fail to demonstrate that Plaintiff included a claim against the officials at FCI-Estill on his June 30, 2004, claim form. Moreover, there is no evidence in the record to demonstrate that Plaintiff has exhausted his administrative remedies as to his alleged FTCA claim against the officials at FCI-Estill. Therefore, Plaintiff's FTCA action will be dismissed, *without prejudice*.

The Court has reviewed Plaintiff's remaining objections, but finds them to be without merit. The Court will enter judgment accordingly.

After a thorough review of the Report and the record in this case pursuant to the standards set forth above, the Court adopts the Report to the extent that it does not contradict this order, and incorporates it herein. Therefore, it is the judgment of this Court that Defendants' Motion for Summary Judgment as to Plaintiff's *Bivens* action must be **GRANTED** and Plaintiff's FTCA claim must be **DISMISSED** *without prejudice*.

IT IS SO ORDERED.

Signed this 24th day of July, 2006, in Spartanburg, South Carolina.

s/ Henry F. Floyd
HENRY F. FLOYD
UNITED STATES
DISTRICT JUDGE

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NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this Order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

A0450 - Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

William Eugene Webb,
#19695-057

Plaintiff

vs.

Matthew B. Hamidullah, Warden; Z R Venda, MD Medical Director; Steve Labeir, Unit Manager, Charles Grubbs, Unit Manager; United States of America;

Defendants

SUMMARY JUDGMENT IN A CIVIL CASE

Case Number:
0:05-2546-HFF-BM

Decision on the Record. This action came before the Court on the record, the Honorable Henry F. Floyd, United States District Judge, presiding. The issues have been reviewed by the Honorable Bristow Marchant, United States Magistrate Judge, who recommended in his Report and Recommendation that the defendant's motion for summary judgment be granted,

IT IS ORDERED AND ADJUDGED that summary judgment is hereby entered for Matthew B. Hamidullah, Warden; Z R Vandella, MD Medical Director; Steve Labor, Unit Manager; Charles Grubbs, Unit Manager and United States of

America. The plaintiff William Eugene Webb, shall take nothing of the defendants on his complaint filed pursuant to Title 42 U.S.C. 1983 and this action is dismissed with prejudice.

LARRY W. PROPES,
Clerk

By
Deputy Clerk

July 25, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

William Eugene Webb, 019695-057,

Plaintiff,

vs.

Matthew B. Hamidullah, Warden;
Z.R. Vendel, MD, Medical Director,
Steve Labeir, Unit Manager,
Charles Grubbs, Unit Counselor,

Defendants.

) C/A No. 0:05-2546-HHF-BM

REPORT AND RECOMMENDATION

This action has been filed by the Plaintiff, pro se pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680. Plaintiff, an inmate with the Federal Bureau of Prisons (BOP), alleges violations of his constitutional rights as well as violations of the FTCA.

The Defendants filed a motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on February 3, 2006. As the Plaintiff is proceeding pro se, a Roseboro order was entered by the Court on February 6, 2006, advising Plaintiff of the importance of a motion for summary judgment and of the necessity for him to file an adequate response. Plaintiff was specifically advised that if he failed to respond adequately, the Defendants' motion may be granted, thereby ending his case. Plaintiff thereafter filed a memorandum in opposition to the Defendants' motion, with attached exhibits, on March 13, 2006.

By order filed April 21, 2006, Defendants were ordered to provide additional evidence to the Court. Defendants filed this material with the Court on May 8, 2006, following which Plaintiff filed a reply affidavit on May 18, 2006. Defendants' motion is now before the Court for disposition.[1]

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[1] This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28

Background and Evidence

Plaintiff alleges in his first amended Complaint[2] that the named Defendants have been deliberately indifferent to his serious medical needs, including compelling him to perform labor beyond his physical capacity. Plaintiff also complains generally that the Defendants violated his rights to "due process" and "equal protection" when they engaged in "retaliatory actions". With respect to his medical claims, Plaintiff alleges that the Defendants were deliberately indifferent to his serious foot deformity, and that they engaged in cruel and unusual punishment "when they refused and failed

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U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d) and (e), D.S.C. The Defendants have filed a motion for summary judgment. As this is a dispositive motion, this Request and Recommendation is entered for review by the Court. this Report and Recommendation is entered for review by the Court.

[2] In this Circuit, verified complaints by pro se prisoners are to be considered as affidavits and may, standing alone, defeat a motion for summary judgment when the allegations contained therein are based on personal knowledge. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991). However, even though Plaintiff's original Complaint was verified, he is now proceeding on an *unverified* amended Complaint. Therefore, the undersigned has not considered the factual allegations set forth in that unverified Complaint as evidence in issuing a recommendation in this case. The attached exhibits to the Complaint have been considered.

to seek other outside medical treatment for Plaintiff's serious left-fore-arm condition, when the contracted physician refused to treat Plaintiff's injury because the Plaintiff smoked tobacco."

As part of the "background facts" section of his Complaint, Plaintiff alleges that following a federal conviction on or about December 2000, and while he was awaiting designation to a federal housing facility, he became extremely ill and was hospitalized for an abdominal hernia complication and kidney failure, for which he had surgery on May 10, 2001. Plaintiff alleges that following his surgery, he was transferred to the U.S. Medical Center for federal prisoners in Springfield, Missouri. Plaintiff alleges that, while at this facility, he was seen by Dr. Hugh Harris on or about August 13 2001, who determined that he was in need of two corrective surgeries, to repair his deformed left forearm, which was broken, and his left wrist, which was dislocated. Plaintiff complains that since this determination he has not received "community standard" medical care for his deformed forearm, or for an abdominal hernia which was diagnosed on or about September 25, 2003.

Plaintiff alleges that he was transferred to the Federal Correctional Institution in Estill, South Carolina on or about June 16, 2004, at which time he "promptly informed the medical personnel of his serious medical conditions, and the medically documented need of surgeries." Plaintiff further alleges that, after being informed that his conditions would receive little, if any, priority, he filed a formal Federal Tort Claim on or about June 30, 2004. Plaintiff has also attached numerous exhibits to his

Complaint, which he discusses under the "relevant facts" portion of his Complaint.

One of these exhibits is a "sick call sign-up sheet" dated June 21 (or 29), 2004, in which he requests follow-up medical care and treatment for several purported health problems. Amended Complaint, Exhibit (A)(1). Plaintiff also alleges that on or about July 21, 2004, he requested and received "convalescent" medical classification status for a seven day period. This classification required that he be re-evaluated every seven days for an extension of his convalescent status. Amended Complaint, Exhibit (A)(10). Plaintiff alleges that on or about July 26, 2004, he again filed a "sick-call slip" seeking treatment for his medical conditions. See Amended Complaint, Exhibit (A)(11). Plaintiff alleges that he was seen by a contract physician on or about July 30, 2004, who recommended that he receive surgery on his hernia. See Amended Complaint, Exhibit (A)(12). Plaintiff alleges that he was also seen by Dr. John George on or about July 30, 2004, who determined that Plaintiff required a fibular bone graft. See Amended Complaint, Exhibits (A)(14). However, Plaintiff alleges that he was told by Dr. George that he would have to quit smoking for six months and have a urine test before this procedure could be performed. See Amended Complaint, Exhibit (A)(15).

Plaintiff alleges that on or about September 3, 2004, he requested and received another convalescent classification status; Amended Complaint, Exhibits (A)(16); (A)(17); but that on or about September 7, 2004 Plaintiff's medical classification was changed by a "S. Barron, MLP" to

"restricted duty" work status, with "no lifting over 10 pounds, and no prolonged standing". See Amended Complaint, Exhibit (A)(18). Plaintiff alleges that he thereafter made an informal complaint regarding his removal from the idle classification to the Defendant Dr. Vendel, Clinical Director of the FCI Estill Medical Department.

Plaintiff also alleges that on or about September 10, 2004, he was seen by a podiatrist, who determined that he should have special orthopaedic footwear. See Amended Complaint, Exhibit (A)(20). Plaintiff further alleges that on or about September 18, 2004, he submitted a sick call slip to medical because he was experiencing pain and discomfort due, Plaintiff alleges, to his assigned work duties as a housing unit orderly; Amended Complaint, Exhibit (A)(21); (A)(22); and that he submitted a second sick call slip to medical on September 20, 2004. See Amended Complaint, Exhibit (A)(23). Plaintiff alleges that he was thereafter seen by Dr. Vendel on or about September 24, 2004, and was told that additional surgeries for his complaints had not been approved. See Amended Complaint, Exhibits (A)(23). However, Plaintiff alleges that following his continued complaints, Dr. Vendel did approve him for surgery on or about November 22, 2004. See Amended Complaint, Exhibits (A)(30).

Plaintiff also continued to complain about pain as a result of his job assignment; Amended Complaint Exhibit (A)(31); and on or about April 28, 2005, he was assigned an updated restricted duty work status pass from the medical department. Plaintiff alleges that he was informed, however, that

this pass would not be considered an excuse to reduce his job assignment performance. See Amended Complaint, Exhibit (A)(32); (A)(33).[3]

Plaintiff alleges that on or about May 13, 2005, he was taken to a hospital for high blood pressure and observation. Plaintiff thereafter filed sick call slips with FCI Medical on or about July 5, 2005 complaining about the physical strain of his assigned work duties, while his mother also contacted prison officials about his medical condition and care. Amended Complaint, Exhibit (B)(5). Plaintiff also alleges that he also filed a formal administrative remedy complaint on or about June 23, 2005 regarding the pain he was having to endure as a result of his work assignment. See Amended Complaint, Exhibit (B)(6).

Plaintiff alleges that on or about June 28, 2005, he was charged with, and found guilty of, failure to perform his assigned job duties; see Amended Complaint. Exhibit (B)(7); which Plaintiff alleges was retaliation for his exercising his legal rights. Plaintiff thereafter filed a complaint of retaliation and race discrimination on or about July 7, 2005. See Amended Complaint, Exhibit (B)(8). Plaintiff alleges he is continuing to be retaliated against, and seeks monetary damages and injunctive relief. See generally, Plaintiff's Amended Complaint with Attached Exhibits.

In support of summary judgment in the case the Defendants have submitted numerous exhibits

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[3] Due to poor print quality, these two (2) exhibits are extremely hard to read.

setting forth the medical care Plaintiff has received since his assignment to the BOP. The Defendant Vendel has also submitted an affidavit wherein he attests that he is the Clinical Director at FCI Estill, and that his duties include ensuring that assigned inmates receive proper and adequate medical treatment. Vendel attests that from May 25, 2001 through January 15, 2003, and again from April 1, 2003 - January 28, 2004, Plaintiff was incarcerated at the United States Medical Center for Prisoners (USMCFP) in Springfield, Missouri for treatment of a ventral hernia and repair to his left forearm which had been injured by a gunshot. Vendel attests that Plaintiff underwent plating and bone grafting to repair his left forearm on August 19, 2002, which was followed up by further surgery and long term IV therapy due to an infection of the graft placed in his left forearm on May 12, 2003. Vendel attests that Plaintiff was transported by USMCFP staff to a local hospital on January 2, 2004 to have surgery performed on his ventral hernia, but that upon arriving at the hospital Plaintiff refused to have this surgery performed. Vendel attests that Plaintiff thereafter remained at the SUMCFP until January 28, 2004, at which time medical staff determined that he had fully healed from his left forearm surgery and could be housed in a mainline institution.

Vendel attests that Plaintiff arrived at FCI Estill on June 16, 2004, and that during a routine physical examination it was noted that he had had plating and bone grafting performed on his left forearm, that he had a ventral hernia, and that he claimed to have nerve damage to his right foot due to a previous gunshot wound. It was also noted during

this examination that Plaintiff had been provided with custom made soft shoes for his right foot and neuropathy. Plaintiff was provided with medications and consultations were initiated to the consultant general surgeon and orthopaedic surgeon for follow-up care for his medical conditions.

Vendel attests that on July 30, 2004, Plaintiff was examined by a consultant general surgeon concerning his ventral hernia, who noted that Plaintiff was status post for a previous gunshot wound to the abdomen for which a previous small bowel resection had been performed, and that Plaintiff had also had a previous ventral hernia repair performed in 2000. Plaintiff indicated to the general surgeon that his ventral hernia was not painful, he did not have any nausea or vomiting, no constipation, and no urinary obstructive symptoms. The general surgeon recommended that a laparoscopic repair of the ventral hernia be performed, which would require a three to four day hospital stay. Vendel attests that he subsequently consulted the general surgeon to ascertain whether or not ventral hernia repair surgery was medically necessary or was instead an elective procedure, at which time the general surgeon stated that this was an elective procedure (i.e., not medically necessary) and that Plaintiff's hernia was reducible and controlled with the use of a hernia belt. Vendel attests that he was further advised to routinely monitor Plaintiff's condition, and that if Plaintiff experienced any further problems or symptoms arose indicating his hernia was becoming strangulated, then surgery would be necessary.

Vendel attests that surgery is not the only treatment option for a hernia, and is not mandatory for reducible hernias (the type of hernia Plaintiff has) dependent on the size of the hernia. Vendel attest that many people live for years without complication with reducible hernias, electing not to have surgical correction, and that unless a hernia is non-reducible, surgical repair is considered elective surgery. Vendel further notes that there are always risk of complications with any kind of surgery, and that the laparoscopic repair of a ventral hernia is not an easy procedure.

Vendel attests that on August 17, 2004 Plaintiff was examined by a consultant orthopaedic surgeon concerning his left forearm, who indicated that Plaintiff had had one previous reconstruction attempt that failed with an infection. This surgeon further stated that it appeared Plaintiff had a segmental defect of his left radius, and that what the segmental loss was would-depend on whether or not Plaintiff needed to have a vascularized fibular graft or bone autograft. The surgeon further indicated that this type of operation had a high risk of being unsuccessful, and that before anyone in his office would attempt such surgery Plaintiff would have to quit smoking for six months and have a urine test. Vendel attests that, following this consultation, Plaintiff continually approached FCI Estill medical staff insisting that he be provided with left forearm surgery and that he knew such surgery did not require extensive stop smoking requirements. Vendel attests that it was explained to the Plaintiff that the vesicles in that part of his arm are impacted by smoking, and that quitting smoking would increase the chances of a successful surgery, but that

Plaintiff continued to disagree and informed medical staff he would have the courts approve the procedure.

Vendel further attests that in April 2005, the BOP initiated a total ban on the use of tobacco products in its facilities, and that as a result of this new policy he initiated another consultation with the orthopaedic surgeon on August 3, 2005 to determine if surgery could now be performed on the Plaintiff since smoking should no longer be a factor. Vendel attests that Plaintiff also continues to receive routine follow-up care for his ventral hernia and his left forearm, and that his ventral hernia is still reducible and controlled with the use of a hernia belt.

Vendel also attests that Plaintiff has not made any complaints to FCI Estill medical staff concerning his right foot neuropathy. Vendel attests that Plaintiff was examined by a consultant podiatrist on September 10, 2005, who indicated Plaintiff has peripheral neuropathy and hammertoe in his right foot, and recommended that Plaintiff be provided with a new pair of custom soft shoes because the shoes Plaintiff had been utilizing appeared to have a break in the sole. Vendel attests that, in addition to these conditions, Plaintiff also has a medical history of gout, alcohol abuse, drug abuse, high blood pressure, chronic renal failure, tobacco abuse, chronic hepatitis C, and gastro esophageal reflux disease, and that due to this medical history Plaintiff is considered a high risk patient. Vendel attests that all of these diagnoses have been taken into consideration when developing a treatment plan for the Plaintiff, and that Plaintiff continues to receive

medical evaluations with alternatives for care and necessary accommodations. Vendel attests, however, that Plaintiff consistently fails to comply with the recommendations given to him, fails to comply with the reciprocal responsibility to comply with medical treatments rendered and to apply life style changes, that Plaintiff continuously disagrees with the recommendations of consultant specialists and institution medical staff regarding his medical care, and that Plaintiff is argumentative and attempts to intimidate medical staff into giving him what he wants when he wants by constantly threatening legal action.

Finally, Vendel attests that Plaintiff has been provided with the medical restrictions of no prolonged standing and no lifting over ten pounds, that he is physically capable of performing work assignments that are commensurate with these medical restrictions, and that there is no medical reason for Plaintiff to be placed on an indefinite convalescent status or be permitted to be exempt from a working assignment. See generally, Vendel Affidavit.

The Defendant Steven Labeir has also provided an affidavit wherein he attests that he is a unit manager at FCI Estill, where he is responsible for the oversight of the orderly and safe running of an inmate housing unit. Labeir attests that he is familiar with the Plaintiff, and that since Plaintiff's arrival at FCI Estill on June 16, 2004 he has been a disruptive and argumentative inmate who constantly threatens staff members that he will sue them if he does not get what he wants when he wants it. Plaintiff also contends that he suffers from

medical problems that prohibit him from having to do any work. Labeir attests that, upon Plaintiff's arrival at FCI Estill, he was assigned to work as a yard orderly, a job which required him to routinely walk around the institution compound and pick up or sweep trash and occasionally mow and trim grass and sweep sidewalks. Labeir attests that this work assignment lasted only eight days because Plaintiff was provided with medical restrictions of no prolonged standing and no lifting over ten pounds because of his medical conditions. Labeir attests that plaintiff was then assigned to work as a unit orderly, where he is only required to wipe down walls and handrails. Labeir further attests that, keeping in mind Plaintiff's medical conditions and restrict ions, he is not required to exert himself while performing this detail and is permitted to sit or lie down when he feels the need. However, Labeir attests that Plaintiff still consistently refuses to work. Labeir also attests that he and his staff routinely consult with the medical department to ensure that the Plaintiff has not been given any additional restrictions that would prohibit him from performing any type of work assignment.

Labeir attests that Plaintiff has received four incident reports while at FCI Estill, and that he has been found to have committed the prohibited acts of failing to work as instructed, refusing to obey an order, and twice has been sanctioned for being unsanitary or untidy. Labeir attests that Plaintiff has been sanctioned for failing to work because he believes he should not be required to work at all, and that he has received incident reports for refusing an order and being unsanitary or untidy because he refuses to keep his living quarters clean and

sanitary. Labeir also attests that he has never denied Plaintiff access to the BOP internal grievance procedure, and that, in fact, since Plaintiff's arrival at FCI Estill, he has filed thirty-four (34) grievances under the BOP's administrative remedy program as well as several documents with the federal courts.

Finally, with respect to Plaintiff's medical care, Labeir attests that he does not provide personal medical care for inmates, and that all decisions regarding Plaintiff's medical care are made by the FCI Estill Clinical Director and his medical staff. Labeir further attests that, to his knowledge, Plaintiff has never been diagnosed with a condition that would totally exempt him from being placed in an inmate job assignment. See generally, Labeir Affidavit.

The Defendant Charles Grubbs has also submitted an affidavit wherein he attests that he is a counselor at FCI Estill, and that his responsibilities include assisting inmates with completion of their programming needs and assisting with the orderly and safe operation of the housing unit. Grubbs attests that he is familiar with the Plaintiff, who alleges that he suffers from medical problems that prohibit him from being assigned to a work detail, and who consistently threatens that he will sue Grubbs if he does not get what he wants. Grubbs attests to the same work history and incident report history for the Plaintiff as has been attested to by Labeir in his affidavit. Grubbs also attests that he has never denied Plaintiff access to the BOP internal grievance procedure, and reiterates Labeir's statements in his affidavit with respect to the number of grievances Plaintiff has

filed. Grubbs further attests that he has no responsibility for providing medical care to the Plaintiff, but that to his knowledge Plaintiff has never been diagnosed with a condition that would totally exempt him from being placed in an inmate job assignment.

Finally, Grubbs attests that he has never threatened the Plaintiff, nor has he taken any actions that could be construed as retaliation against the Plaintiff. Grubbs attests that he has continuously attempted to resolve matters with the Plaintiff in an amicable manner, but that Plaintiff does not provide the same courtesy and simply tells Grubbs that he will have the court settle his claims. See generally, Grubbs Affidavit.

The Defendant Hamidullah has provided an affidavit wherein he attests that he is the Warden at FCI Estill. Hamidullah attests that, as Warden, he does not provide personal medical care for any inmate, that he has had no personal involvement in the medical decisions that have been made regarding Plaintiff's medical care, and that all medical decisions are made by the Clinical Director and his medical staff. Hamidullah attests that on July 20, 2005 he provided a response to a request for administrative remedy in which Plaintiff asserted that he was not receiving appropriate medical care, and that in this response he informed Plaintiff that a review of his medical file indicated he was receiving appropriate medical care and had been provided with medical restrictions commensurate with his medical conditions. Hamidullah further attests that inmate job assignments are assigned by the Plaintiff's unit team staff and are dictated by the

needs of the institution, that he [Hamidullah] is not aware of Plaintiff's job assignment or whether or not he has any medical restrictions that prohibit certain types of job assignments, and that he does not recall Plaintiff ever personally informing him of any problems with his inmate job assignments. See generally, Hamidullah Affidavit.

As an attachment to his memorandum in opposition to the Defendants' motion for summary judgment, Plaintiff has provided an affidavit in which he repeats many of the allegations of his Complaint, denies he has ever refused surgery, and argues that when the podiatrist prescribed him orthopaedic shoes, Vendel should have ensured that he received them. Plaintiff also cites to one of his medical records, attached to his affidavit as Exhibit A, p. 00009, to argue that, while the surgeon agreed with Vendel that surgery was not urgent and could be done electively, it was supposed to have been done within the time frame of six months. See Attached Exhibit. Plaintiff also attests that he was never provided with a hernia belt, but was instead provided with a back brace by the health service administrator, who stated his intention of ordering him a hernia binder, which after six months he had not received. Plaintiff attests that he has stopped smoking, but that he has not received a urine test or any presurgery examinations by an orthopaedic doctor, even though Vendel knows that he does not smoke. Plaintiff also asserts that the job he is required to perform is not commensurate with his medical restrictions, and that his chronic medical conditions cause him considerable pain and daily discomfort.

Plaintiff further denies that he has ever been disruptive or disrespectful, and that both Grubbs and Labeir have "unequivocally informed me that they both have a strong dislike of black men, and especially those that question their actions, in any manner." Plaintiff also disputes that, as a unit orderly, he is only required to wipe down walls and handrails. Plaintiff attests that he has often been ordered to sweep and mop floors, scrub shoe scuffmarks from walls of the entire housing unit, strip and wax floors, paint walls, and other physical work assignments. Plaintiff also states that, since the filing of this civil action, he has "been totally denied administrative remedy grievance due process", and that over five of his filed grievances have not been responded to in over two months. See generally, Plaintiff's Affidavit, with attached Exhibits.

Plaintiff has also submitted an affidavit from fellow inmate Dominique Green (Plaintiff's Exhibit H), who attests that from March 2005 through July 2005 he was Plaintiff's cellmate at FCI Estill. In his affidavit, Green contests the validity of incident reports served on he and the Plaintiff on May 13, 2005 charging them with failure to follow safety or sanitation regulations and with being unsanitary or untidy. See generally, Green Affidavit. See also Plaintiff's Exhibit (B)(3). Another affidavit has been provided from fellow inmate Davin Lamont Smith (Plaintiff's Exhibit I), wherein he attests that on or about September 21, 2005 he and the Plaintiff were written incident reports for being untidy, failing to keep quarters in accordance with posted standards, and unexcused absence from work. Smith attests that these incident reports were written after he and

the Plaintiff had been cellmates for about a month, that he had taken full responsibility for keeping the cell clean, and that Plaintiff should not have been convicted of this charge. See generally, Smith Affidavit.

In response to the Court's order of April 21, 2006, Vendel submitted a supplemental affidavit (Court Document #27) responding to several specific issues raised by the Plaintiff in his filings. First, with respect to Plaintiff's assertion in his affidavit (submitted with his memorandum opposing summary judgment) that he has quit smoking, and in fact quit smoking prior to the implementation of the BOP's tobacco ban in April 2005, but that he has still never had a urine test and never been scheduled for surgery, Vendel attests in his supplemental affidavit that Plaintiff was in fact seen by a consultant orthopaedic surgeon for his left arm condition on March 1, 2006 (prior to the date of Plaintiff's affidavit); see also Vendel Supplemental Affidavit, Attachment 1 [Office Visit Notes]; following which the consultant orthopaedic surgeon indicated he could not promise that surgery would work and also indicated that, in addition to failure of the procedure, the risks from surgery included infection, bleeding, wound complications, nerve and vessel injury, and the possible need for additional procedures. Vendel attests that after he reviewed the orthopaedic surgeon's examination notes, he [Vendel] did not recommend approving the surgery and recommended continuing treatment of Plaintiff's left arm with conservative therapy. See also Vendel Supplemental Affidavit, Attachment 2. Vendel further attests that the matter has been referred to the Institution's Utilization Review Committee for

consideration, and that if the Committee does not agree with his recommendation to disapprove the surgery, Plaintiff will be scheduled for surgery at the direction of the orthopaedic surgeon, but that in any event treating Plaintiff's condition conservatively instead of with surgery in no way places Plaintiff in any kind of danger or risk of harm.

With respect to Plaintiff's statement in his affidavit that he has never been provided new shoes notwithstanding the consultant podiatrist's recommendation of September 10, 2005 that he receive a new pair of custom soft shoes because the shoes Plaintiff had been utilizing appeared to have a break in the sole, Vendel attests that the podiatrist clearly indicated to the Plaintiff following his September 10, 2005 examination that he [Plaintiff] was to check with the Health Services Administrator regarding orthopaedic shoes, and that there is nothing in the medical record after September 10, 2005 to show that Plaintiff ever spoke with the Health Services Administrator about orthopaedic shoes. Vendel further attests that, although it is clearly documented that Plaintiff has a foot deformity due to sustaining a gunshot wound, he has not reported during sick call or chronic care clinic appointments any problems with his foot for approximately one year, and that he [Vendel] believes Plaintiff is fully capable of ambulating in regular footwear without difficulty, and no longer needs the continued use of custom orthopaedic shoes.

Finally, with respect to Plaintiff's statement in his affidavit that he has never been provided with a hernia belt and has instead only been provided with a back brace, which is of no use in dealing with

his hernia condition, Vendel attests in his supplemental affidavit that Plaintiff was issued a hernia belt by the Health Services Administrator on August 10, 2005. See also Vendel Supplemental Affidavit, Attachment 3 [Hernia Belt Issuance Certificate date August 10, 2005]. Vendel further attests that on March 2, 2006, a new hernia belt was ordered and Plaintiff was instructed that once it arrived it would be issued. See also, Vendel Supplemental Affidavit, Attachment 4. Vendel attests that Plaintiff was also examined by the consultant general surgeon regarding the status of his ventral hernia on March 10, 2006, and that the general surgeon has recommended operative repair via laparoscopic surgery. See also, Vendel Supplemental Affidavit, Attachment 5. Vendel attests that even though Plaintiff has refused surgery for his ventral hernia on two previous occasions, he reviewed the consultation notes provided by the general surgeon on April 27, 2006, and that even though this surgery is an elective procedure, he has submitted the general surgeon's recommendation to the Utilization Review Committee. Vendel attests that if the Committee approves the procedure, it will be scheduled. See also, Vendel Supplemental Affidavit, Attachment 6.

In response to this evidence, Plaintiff attests in his supplemental affidavit that Vendel has continued to deny him surgery, even though he "constantly complained of pain and discomfort...." Plaintiff also attests that Vendel refuses to provide him with new replacement orthopaedic shoes, even though a podiatrist has recommended that he be provided with new shoes. Plaintiff also attests that he never received a replacement hernia belt, but was

only given a back brace, and complains about Vendel refusing to schedule him for hernia surgery. Plaintiff does concede that he was seen by a surgeon on March 28, 2006, as attested to by Dr. Vendel in his affidavit, but complains about having been shackled during the ride to the surgeon's office, stating that the restraints caused him great pain due to his wrist and arm problems. Plaintiff states that this resulted in his arm being "swollen considerably." Finally, Plaintiff attests that he has never refused surgery, and that Attachment 6 to Vendel's Supplemental Affidavit is a 'fabrication'. See generally, Plaintiff's Supplemental Affidavit.

Discussion

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. The moving party has the burden of proving that judgment on the pleadings is appropriate. Once the moving party makes this showing, however, the opposing party must respond to the motion with "specific facts showing there is a genuine issue for trial" Rule 56(e), Fed.R.Civ.P. Further, while the Federal Court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, see Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972), the requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleadings to allege facts which set forth a Federal

claim, nor can the Court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Social Services, 901 F.2d 387 (4th Cir. 1990).

I

(*Bivens* Claim)

Since Plaintiff is a federal prisoner, his constitutional claims are evaluated under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra, which established a direct cause of action under the Constitution of the United States against federal officials for the violation of federal constitutional rights. Bivens, 403 U.S. at 397. A Bivens claim is analogous to a claim brought against state officials under 42 U.S.C. § 1983; therefore, caselaw involving § 1983 claims is applicable in Bivens actions, and vice versa. See Farmer v. Brennen, 511 U.S. 825 (1994); Bolin v. Story, 225 F.3d 1234, 1241-1242 (11th Cir. 2000); Campbell v. Civil Air Patrol, 131 F.Supp.2d 1303, 1310, n. 81(M.D.Ala. 2001).

1) Medical Claim. With respect to Plaintiff's medical claim, in order to survive summary judgment and proceed with this constitutional claim in this Court, Plaintiff must present evidence sufficient to create a material issue of fact as to whether any named Defendant was deliberately indifferent to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Farmer, 511 U.S. at 837; Sosebee v. Murphy, 797 F.2d 179 (4th Cir. 1986); Wester v. Jones, 554 F.2d 1285 (4th Cir. 1977); Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975); Belcher v. Oliver, 898 F.2d 32, 34 (1990).

However, a careful review of the affidavits and other exhibits presented to this Court shows that, whatever Plaintiff may think about the level of care he is receiving, he has failed to submit evidence sufficient to show that his *constitutional rights* are being violated.

Indeed, Plaintiff's medical file is actually quite extensive, and although he is correct that he has received recommendations for surgical care, Defendants note that there is no indication in the medical evidence that these recommendations were based on any surgical necessity. Rather, the surgery discussed was elective. While Plaintiff makes general and conclusory claims as a lay person that he should have the surgery he is requesting, he has provided no medical evidence to support his claim that any surgery is medically required at this time, and the Court is not required to simply accept as true general or conclusory claims and allegations absent any factual or evidentiary support. See Papasan v. Allain, 478 U.S. 265, 286 (1986)[Courts need not assume the truth of legal conclusions couched as factual allegations.]; Bender v. Suburban Hospital. Inc., 159 F.3d 186 (4th Cir. 1988); Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987)["Even though pro se litigants are held to less stringent pleading standards than attorneys the court is not required to 'accept as true legal conclusions or unwarranted factual inferences.'"].

Conversely, Dr. Vendel, a physician, attests in his affidavit and supplemental affidavit that Plaintiff's ventral hernia remains reducible and controlled, and that continuing to treat both

Plaintiff's hernia and left arm condition conservatively instead of with surgery in no way places Plaintiff in any kind of harm. For purposes of a constitutional claim, whether or not Plaintiff was provided with the care he desires or has requested is immaterial. Jackson v. Fair, 846 F.2d 811, 817 (1st Cir. 1988) [the Constitution "does not guarantee to a prisoner the treatment of his choice."]; see also Brown v. Thompson, 868 F.Supp. 326, 329-330, n. 2 (S.D.Ga. 1994); Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990) [A physician's actions only rise to the level of deliberate indifference when the treatment provided is "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness."]; Casey v. Lewis, 834 F.Supp. 1569, 1583 (D.Ariz. Apr. 5, 1993).

Further, the medical records provided to the Court, in addition to detailing the frequent and ongoing medical care and evaluations received by the Plaintiff; also directly contradict many of the statements Plaintiff makes in his affidavit. For example, Plaintiff states that the general surgeon indicated his hernia surgery needed to be done within a six month time frame. However, the cited entry from Dr. Vendel actually reads: "I have discussed this case [with] the [general] surgeon. We agreed that the surgery is not urgent, can be done electively within a time frame of 6 mos.". See Amended Complaint, Exhibit (A)(9). This statement does not constitute a *requirement* that any surgery be done within six months, as Plaintiff would have this Court believe, nor has Plaintiff offered any evidence to show that this was required surgery during the relevant time period.

Plaintiff's complaint that he was *never* provided with a hernia belt is also contradicted by the medical records. Vendel Supplemental Affidavit, Attachment 3; see Morgan, 829 F.2d at 12 [court not required to accept as true unwarranted factual inferences]. While obtaining a belt for the Plaintiff may have taken some time, even assuming there was a delay in Plaintiff's receipt of a hernia belt, the fact remains that the medical evidence before the Court shows that Plaintiff's hernia remains reducible, with no evidence having been presented that Plaintiff has suffered any injury as a result of a delay in receiving a hernia belt. *Cf.* Casey, 834 F.Supp. at 1583 ["[A] mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference."].

Plaintiff also takes issue in his supplemental affidavit with the Defendant's contention that he has refused surgery on several occasions, stating that he has never refused surgery. Plaintiff also accuses Dr. Vendel of falsely stating that he had refused surgery in January 2004, noting that he was not even at FCI-Edgefield in January 2004. However, Plaintiff's medical records again directly contradict his statements. While it is true Plaintiff was not at FCI-Edgefield in January 2004, his medical records show that he was evaluated at FCI-Springfield on January 5, 2004, with the medical record showing that "[Plaintiff] was scheduled downtown for repair, but the patient refused surgery and [was] transferred back to the institution." See Defendants' Exhibit 3 [Transfer Summary dated January 5, 2004].

As for Plaintiff's complaints about his shoes, while his medical record does show that a podiatrist

has recommended that he receive new shoes because his old shoes had worn out, Dr. Vendel attests in his affidavit that Plaintiff has not reported any problems with his foot during sick call or chronic care clinic appointments for approximately one year, and that he does not believe Plaintiff needs the continued use of custom orthopaedic shoes and is fully capable of ambulating in regular footwear without difficulty. The fact that two physicians may dispute the necessity for Plaintiff to wear orthopaedic shoes does not amount to evidence that Plaintiff's *constitutional rights* are being violated, or that any Defendant has shown a deliberate indifference to Plaintiff's serious medical needs. White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990) ["If a plaintiff's disagreement with a doctor's professional judgment does not state a violation of the Eighth Amendment, then certainly no claim is stated when a doctor disagrees with the professional judgment of another doctor."]; *cf.* Buckner v. Warden, No. 92-6228, 1993 WL 62065 at **2 (4th Cir. Mar. 9, 1993) ["Regardless of whether there might be another doctor who might agree with [plaintiff] on this point, this is not a record on which a claim for deliberate indifference by the state officials is shown to any degree"], cert. denied, 510 U.S. 842 (1993).

In sum, even if the Court were to find that the evidence presented was sufficient to create a genuine issue of fact as to whether Dr. Vendel or any other named Defendant acted inappropriately or with out sufficient care in dealing with Plaintiff's medical complaints, for the reasons stated such conduct would not be sufficient to maintain a Bivens claim for deliberate indifference to a serious medical need.

Rather, Plaintiff would have to pursue these claims in tort under the Federal Tort Claims Act. *Cf.* Estelle, 429 U.S. at 106 ["medial malpractice does not become a constitutional violation merely because the victim is a prisoner."]. See Section II, infra. Therefore, as there is no evidence before the Court to show that during the relevant time period the Defendants were deliberately indifferent to any serious medical condition from which the Plaintiff was suffering as that term is defined in the applicable caselaw, this claim should be dismissed. Estelle 429 U.S. at 105; Harris v. Thigpen, 941 F.2d 1495, 1505-1507 (11th Cir. 1991); see Levy v. State of Ill. Dept. of Corrections, No. 96-4705, 1997 WL 112833 (N.D.Ill. March 11, 1997) ["A defendant acts with deliberate indifference only if he or she 'knows of and disregards' an excessive risk to inmate health or safety.'"], quoting Farmer, 511 U.S. at 837.

2) Retaliation Claim. With respect to Plaintiff's retaliation claim, Plaintiff generally cites to the disciplinary infractions he was charged with and then argues they were only filed out of retaliation for Plaintiff pursuing his claims. However, Plaintiff has provided no evidence whatsoever to support such a finding in this case. Rather, he has provided only general and conclusory allegations that the Defendants' actions constituted unlawful retaliation. This is not "evidence" sufficient to survive summary judgment. See Atkinson v. Bohn, 91 F.3d 1127, 1129 (8th Cir. 1996) (per curiam) [speculative and conclusory allegations cannot support retaliation claim]; Wright v. Vitall, No. 91-7539, 1991 WL 127597 at**1 (4th Cir. July 16, 1991) [Retaliation claim based on mere conclusory statements cannot withstand defendants'

summary judgment motion]; LaCroix v. Williams, No. 97-0790, 2000 WL 1375737 at *4 (W.D.N.Y. Sept. 21, 2000) ["Plaintiff's conclusory allegations aside, there is simply nothing in the record to support his version of the facts and plaintiff's claim for retaliation fails"]; see Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977) [in order to be actionable, an alleged retaliatory act must violate some constitutional right of an inmate or constitute punishment for the exercise of a constitutional right]; Woods v. Edwards, 51 F.3d 577, 580-581 (5th Cir. 1995) [summary judgment affirmed where inmate offered no evidence other than his personal belief that the alleged retaliatory actions were based on his exercise of his rights].

Defendants correctly note that claims of retaliation are generally treated with skepticism by the Courts, because "[e]very act of discipline by prison officials is by definition 'retaliatory' in the sense that it responds directly to prisoner misconduct." Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996), (citing Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994)). Here, Plaintiff complains about disciplinary action taken against him as a result of his own misconduct, and then generally ascribes retaliatory motives to explain these disciplinary charges. However, as noted, none of the exhibits provided to the Court, either by the Defendants *or* by the Plaintiff, constitute evidence to support Plaintiff's claim that he is being retaliated against.

The affidavit Plaintiff provided from Dominique Green simply reiterates Plaintiff's assertions that the charges for failure to follow

safety or sanitation regulations and for being unsanitary or untidy were without merit. It is not evidence that any named Defendant engaged in any unlawful conduct. Inmate David Smith's affidavit also does not help the Plaintiff. Smith attests that, after he and the Plaintiff (roommates) were charged with being untidy and failing to keep quarters in accordance with pasted standards, he [Smith] had taken full responsibility for keeping the cell clean and that the Plaintiff should therefore not have been convicted of this charge. However, while it may have been nobler for Smith to take the total blame for the cell he shared with the Plaintiff being untidy, it nevertheless remains a fact that *both* inmates occupied that cell, and there is nothing in the evidence before the Court to show that a conviction of both cellmates on a charge that their cell was unsanitary constituted retaliation against the Plaintiff. Such general and conclusory claims of retaliatory animus are simply not sufficient to maintain a retaliation claim in a Bivens action. See Harris v. Ostrout, 65 F. 3d 912, 916 (11th Cir. 1995)[case dismissed where Plaintiff produced nothing beyond his own conclusory allegations suggesting that prison official's actions were motivated by a retaliatory animus]; Adams, 40 F.3d at 74-75, cert. denied 514 U. S. 1022 (1995); Southmark Prime Plus, L.P. v. Falzone, 776 F.Supp. 888, 891 (D.Del. 1991); see Nasim v. Warden. Md. House of Correction, 42 F.3d 1472, 1475 (4th Cir. 1995), *reh'g* 64 F.3d 951 (4th Cir. 1995), cert. denied, 516 U.S. 1177 (1996); see also Papasan, 478 U.S. at 286 [courts need not assume the truth of legal conclusions couched as factual allegations]; Morgan, 829 F.2d at 12 ["even though pro se litigants are held

to less stringent pleading standards then attorneys, the court is not required to 'accept as true legal conclusions or unwarranted factual inferences.'"]. Therefore, this claim is without merit and should be dismissed.

3) Job Assignment. Plaintiff's claim concerning his job assignment is also without merit. To the extent Plaintiff is arguing that his job assignment is based on retaliation by the Defendants, he has failed to set forth sufficient evidence to proceed with that claim for the reasons already discussed, supra. Otherwise, Plaintiff has set forth no medical evidence to counter the evidence submitted by the Defendants to show that he is capable of performing prison jobs with the medical restrictions of no prolonged standing and no lifting over ten pounds, and that there is no medical reason for Plaintiff to be placed on an indefinite convalescent status or be permitted to be exempt from a working assignment. Plaintiff's own opinion that he should not have to work because he is not physically able, without any supporting medical or other evidence, is simply not evidence sufficient to survive summary judgment.[4] House v. New Castle County, 824 F.Supp. 477, 485 (D.Md. 1993) [plaintiff' conclusory allegations insufficient to maintain claim]. This claim should be dismissed.

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[4] However, even though Plaintiff has been medically approved for work, Defendants are cautioned that Plaintiff cannot be required to perform work while on his job that is inconsistent with his medical restrictions. *Cf.* Jaladian v. Hughes, No. 04-1304, 2006 WL 1629114 (E.D. Cal. June 9, 2006).

II.

(Federal Tort Claim)

Plaintiff also asserts that he is presenting his claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680. The FTCA waives sovereign immunity and allows suits against the United States for personal injuries caused by governmental employees acting within the scope of their employment.[5] Under this act a plaintiff may recover monetary awards from the United States for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope...of...employment." 28 U.S.C. § 1346(b). Whether any government employee was negligent is to be determined "in accordance with the law of the place where the act or omission occurred." Id.

However, the FTCA waives the sovereign immunity of the United States only in certain situations, and in order to obtain relief under this Act, litigants must strictly comply with the FTCA's requirements. See 28 U.S.C. § 2675; Johnson v. Smithsonian Inst., 189 F.3d 180, 189 (2d Cir. 1999) ["In order to state a claim under the FTCA, the person attempting to assert it must comply with several strictly construed prerequisites."] United States v. Kubrick, 444 U.S. 111, 117-118 (1979). Among these requirements is that an administrative claim must first be filed with the appropriate federal

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[5] Although the United States has not been named as a party Defendant, Defendants do not seek dismissal of Plaintiff's FTCA claim on that ground.

agency before commencement of a civil action in a district court. See 28 U.S.C. § 2675; McNeil v. United States, 508 U.S. 106, 113 (1993) ["The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies."]. Defendants assert in their motion for summary judgment that Plaintiff has filed no federal tort claim dealing with the conditions of his confinement at FCI-Edgefield. While Defendants concede that Plaintiff has filed an administrative claim, a review of that filing shows that it relates to conditions of Plaintiff's confinement while he was confined at the Federal Correctional Institution in Springfield, Missouri, not at FCI Edgefield. See Defendants' Exhibit 10.

Plaintiff did not respond to this argument in his memorandum or affidavits opposing summary judgment, and has presented no evidence to show that he has exhausted his administrative remedies with respect to any tort claims at FCI-Edgefield. Hence, as there is no evidence before the Court to show that Plaintiff has filed an administrative claim concerning the allegations set forth in his amended Complaint, or to demonstrate that he has properly exhausted his administrative remedies prior to filing this lawsuit, his claims under the FTCA should be dismissed, without prejudice.

Conclusion

Based on the foregoing, it is recommended that the Defendants' motion for summary judgment be **granted**, and that this case be **dismissed**. To the extent Plaintiff has asserted an FTCA claim, that claim should be **dismissed**, without prejudice.

The parties are referred to the Notice Page attached hereto.

Bristow Marchant
United States Magistrate Judge

Columbia, South Carolina

June 23, 2006

FILED: August 8, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 06-7381 (L)
(0:05-CV-02546-HFF)

WILLIAM EUGENE WEBB

Plaintiff - Appellant

v.

MATTHEW B. HAMIDULLAH, Warden; Z. R. VENDELL, M.D., Medical Director; STEVE LABIER, Unit Manager; CHARLES GRUBBS, Unit Manager; UNITED STATES OF AMERICA

Defendants - Appellees

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge King, and Judge Gregory.

For the Court
/s/ Patricia S. Connor, Clerk